Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978 No. 78-57

COMMONWEALTH OF PENNSYLVANIA, *Appellee*

v.

J & R EQUIPMENT RENTAL CO., INC., *Appellant*

COMMONWEALTH OF PENNSYLVANIA, *Appellee*

v.

FIVE-R EXCAVATING, INC., *Appellant*

MOTION TO DISMISS OR AFFIRM

On Appeal from the Supreme Court of Pennsylvania

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QUESTION PRESENTED

Is there a violation of the Equal Protection provisions of the Fourteenth Amendment when the requirement of a State filing statute provides a course of procedure which is applied to Appellant in the same manner as to all other persons in the State under similar circumstances and conditions, and that same procedure is in effect under United States Supreme Court Rule and Federal Law?

MOTION TO DISMISS OR AFFIRM

The Commonwealth (Appellee) moves the Court to dismiss the appeal herein, or, in the alternative, to affirm the judgment of the Supreme Court of Pennsylvania on the grounds that the appeal raises no substantial federal question and that Appellant's major contention below has previously been decided adversely to the Appellant's position by both this Court and the Federal Circuit Courts.

SUMMARY OF ARGUMENT

The issue raised by the Appellant in its Jurisdictional Statement does not raise a substantial federal question. Appellant's unequal protection of law contention was rejected in a well-reasoned opinion by Pennsylvania's Commonwealth Court. That Court stated that it is an established rule that equal protection of the laws is not denied by a course of procedure which is applied to legal proceedings in which a particular person is affected, if such procedure would also be applied to any other person in the State under similar circumstances and conditions. That Court's opinion cited *Tinsley v. Anderson*, 171 U.S. 101 (1898), in support thereof. The Commonwealth Court's opinion was affirmed by a unanimous decision of the Supreme Court of Pennsylvania.

No substantial federal question is raised by a statute which merely defines the length of time within which an appeal to a Review Board must be lodged; and the provisions of that statute are applied equally. It is within the discretion of the State Legislature to so provide.

Further, the main contention raised by Appellant in State courts was that the mailing date of the appeal should prevail over the receipt date even though the statute required filing. This question has been previously decided by this Court adversely to Appellant's position and such adverse decision affirmed frequently by the Federal Circuit Courts; and United States Supreme Court Rule 11 is consistent with those decisions.

STATEMENT OF THE CASE

The first administrative level for a hearing of a sales and use tax assessment in Pennsylvania is the Sales Tax Board of Review. In this case, after a proper hearing, that Board rendered decisions on Appellant's Petitions for Reassessment on February 14, 1975, and mailed the decisions that same day. Appellant admits receipt of the decisions on February 15, 1975, one day later. All the facts herein have been stipulated to by both parties.

The second stage of the administrative appeal process is an appeal to the Board of Finance and Revenue. The Appellant did not mail its Petition for Review (Appeal) from Pittsburgh to the Board of Finance and Revenue until sometime on the day of April 14, 1975; and the Petition was not received until April 16, 1975, at 8:36 a.m. This date was one day beyond the appeal period provided by Section 234 of the Tax Reform Code of 1971, P.L. 6, No. 2, Article I, 72 P.S. § 7234 (hereinafter referred to as the "Code").

The Board of Finance and Revenue, after a hearing, issued an Order dated August 4, 1975. This Order refused the Appellant's Petitions for Review for lack of jurisdiction due to the late filing. This Order stated that the requirements of Section 234 of the Code had not been met.

Appellant then filed an appeal to Commonwealth Court of Pennsylvania, which Court reviewed the briefs and heard oral argument. That Court filed an opinion, 28 Pa. Commonwealth Ct. 558, 368 A. 2d 1389 (1977), holding that simply mailing a Petition for Review within the specified sixty-day period did not constitute actual receipt, and that actual receipt by the Board within the period was required to satisfy filing under Section 234. The Commonwealth Court's opinion also specifically held that Section 234 of the Code did not violate any Constitutional guarantees, including equal protection of the law. There were no dissents.

The Opinion and Order of Commonwealth Court are appended to Appellant's Jurisdictional Statement as Appendix "A".

Appellant duly filed an appeal to the Supreme Court of Pennsylvania. After reviewing the briefs and hearing oral arguments in which Appellant raised the contention of a violation of equal protection, the Supreme Court of Pennsylvania unanimously affirmed the Order of the lower Court dismissing Appellant's appeal. The opinion was per curiam and is reported at — Pa. —, 384 A. 2d 240 (1978).

The Per Curiam Opinion and Order of the Supreme Court of Pennsylvania are appended at pages 14 through 16 of Appellant's Jurisdictional Statement as Appendix "A".

Appellant then filed this instant appeal.

ARGUMENT

A. This Case Presents No Substantial Federal Question.

Appellant claims that Section 234 of the Tax Reform Code of 1971, P.L. 6, No. 2, Article I, 72 P.S. § 7234, violates the Equal Protection provisions of the Fourteenth Amendment. However, Commonwealth Court correctly analyzed this contention; and in its Opinion, *Commonwealth v. J & R Equipment Rental Co., Inc.* and *Commonwealth v. Five-R Excavating, Inc.*, 28 Pa. Commonwealth Ct. 558, 368 A. 2d 1389 (1977), flatly rejected such argument. At page 562 of the Commonwealth Court Reports, that Court stated as follows:

> "Section 234 clearly provides that the sixty day appeal period is to be measured from the date of mailing of notice by the Bureau. Although it is true that the length of the interval between the mailing of notice by the Bureau and its receipt by a prospective appellant may well be dependent upon the party's geographical location relative to the place of mailing, we do not believe that the slight differential in the appeal period of individual taxpayers so resulting from differences in mail service will render the section constitutionally infirm. It is an established rule that equal protection of the laws is not denied by a course of procedure which is applied to legal proceedings in which a particular person is affected, if such procedure would also be applied to any other person in the state under similar circumstances and conditions. Tinsley v. Anderson, 171 U.S. 101 (1898). Section 234 gives all taxpayers a sixty day period in which to bring their appeals, and we do not find it unreasonable that the act of mailing of notice is used as the guidepost for determining the start of this period. We cannot perceive that this results in any arbitrary classification of, nor discrimination among, taxpayers."

The case cited by the Commonwealth Court, *Tinsley v. Anderson*, supra, is a leading authority. In *Tinsley*, this Court stated that the right to equal protection is not denied by a State Court when it is apparent that the same law or course of procedure would be applied to any other person in the state under similar circumstances. As stated by the Commonwealth Court in the above quote, Section 234 of the Code gives all taxpayers a sixty-day period in which to bring their appeals. That Court further stated that the statute and its application does not result in any arbitrary classification of, nor discrimination among, taxpayers.

Section 234 of the Code, 72 P.S. § 7234, is as follows:

> "Within sixty days after the date of mailing of notice by the department of the decision on any petition for reassessment filed with it, the person against whom such assessment was made, may, by petition, request the Board of Finance and Revenue to review such decision. The failure of the department to notify the petitioner of a decision within the time provided for by section 232 shall act as a denial of such petition, and a petition for review may be *filed* with the Board of Finance and Revenue within one hundred twenty days of the date prior to which the department should have mailed to the petitioner its notice of decision. Every petition for review *filed hereunder* shall state specifically the reasons on which the Petitioner relies, or shall incorporate by reference the petition for reassessment in which the reasons are stated. The petition shall be supported by affidavit that it is not made for the purpose of delay and that the facts set forth therein are true. The Board of Finance and Revenue shall act finally in disposing of *petitions filed* with it within six months after they have been received. In the event of the failure of the board to dispose of any petition within six months, the action taken by the department, upon the petition for re-

assessment, shall be sustained. The Board of Finance and Revenue may sustain the action taken by the department on the petition for reassessment, or it may reassess the tax due on such basis as it deems according to law. The board shall give notice of its action to the department and to the petitioner." (Emphasis supplied.)

The sixty-day filing period mandated by the above quoted statute, which under Pennsylvania case law means actual receipt, mandates equality. All appeals to the Board of Finance and Revenue must be actually received by the Board within the sixty days to be timely. Since the constitutionality and necessity for a limited appeal period is not questioned, the only taxpayers foreclosed are those who, like the Appellant, simply have failed to properly avail themselves of their legal remedies. To foreclose such appeals is not a violation of equal rights, but simply the law as the Legislature and the Courts have determined it should be.

The rule of law regarding Equal Protection as set down in *Tinsley*, supra, has been followed in numerous cases; a few such cases are: *Chase Securities Corporation v. Donaldson*, 325 U.S. 304 (1945); *Williams v. Arkansas*, 217 U.S. 79 (1910); *Keeley v. Evans*, 271 F. 520 (1921); *Powell v. Workmen's Compensation Board of State of New York*, 214 F. Supp. 283 (1963); *Oberlin v. Domestic Relations Court*, 159 F. Supp. 59 (1958); and most recently, *Moore v. Spangler*, 401 Mich. 360, 258 N. W. 2d 34 (1977).

In the above cited *Powell v. Workmen's Compensation Board*, the District Court stated at page 286 as follows:

> "It is well established that in order to violate the equal protection clause, a statute must discriminate against a particular class of persons."

Appellant has failed to show any particular class discriminated against by Section 234 of the Code. In fact, the

Powell case involved a statute of limitations which Appellant claimed discriminated in favor of defendants to the detriment of plaintiffs. The Court answered that contention at page 286 in the following manner:

> "Assuming, without in any way deciding that the statute has that effect, no question under the equal protection clause is thereby raised. There is nothing in the amended complaint to differentiate this case from Tinsley v. Anderson, supra, . . . Plaintiff's first claim of unconstitutionality is obviously without merit and therefore presents no substantial federal question."

Thus, the *Powell* case is quite similar on the facts and contentions to the instant appeal and the Federal District Court held there was no violation of equal protection and that Appellant presented no substantial federal question.

Appellant's equal protection contention is completely belied by this Court's own Rule 11, which Rule has exactly the same provision as the statute Appellant herein claims violates the Equal Protection Clause. United States Supreme Court Rule 11 requires that the notice of appeal be filed within ninety (90) days of the entry of judgment of the lower court. The ninety (90) day period is computed in precisely the same manner as the time for appeal was in the instant case.

Based on the foregoing, neither Section 234 of the Code, nor the United States Supreme Court Rule 11 violate the Equal Protection Clause. Therefore, there is no substantial federal question.

B. This Case Presents No Substantial Question Not Previously Decided By Federal Courts.

In the briefs and oral arguments presented to Commonwealth Court of Pennsylvania and the Supreme Court of Pennsylvania, Appellant's major contention was that the mailing date of the appeal should prevail and not the actual date of receipt of the appeal by the appropriate official. Since the statute in question (Section 234 of the Code), as interpreted by Pennsylvania's Commonwealth and Supreme Courts, required filing; both Pennsylvania Courts rejected this contention.

There is a substantial amount of federal case law on the subject of what constitutes filing of an appeal. In a variety of statutory contexts, the Federal Courts, including this Court, have held that a document is filed only when the proper official actually acquires custody. In the case of *United States v. Lombardo*, 241 U.S. 73 (1916), the Supreme Court stated as follows:

> "Filing, it must be observed, is not complete until the document is delivered and received. 'Shall file' means to deliver to the office and not sent through the United States mails. A paper is filed when it is delivered to the proper official and by him received and filed." p. 76-77 (Citations omitted.)

Following the *Lombardo* rule, *Phinney v. Bank of Southwest National Association, Houston*, 335 F. 2d 266 (5th Cir. 1964), focused on the same contention as Appellant raised below in this case; *Phinney* stated: "The filing of a paper takes place upon the delivery of it to the officer at his office. Mailing is not filing. When the mails are utilized for the purpose of filing an instrument, the filing takes place upon delivery at the office of the official required to receive it." 335 F. 2d at 268.

In *Park Management v. Porter*, 157 F. 2d 688 (U.S. Emergency Court of Appeals, 1946), the issue was whether

a landlord had properly filed a document pursuant to rent regulations of the Office of Price Administration. The Court held, citing *Lombardo*, that if a landlord chooses to use the mails, the risk that papers required to be filed may not reach their destination lies with him. He takes the chance. See page 689.

The above situation is precisely what Appellant did in the instant case. Appellant mailed the Petition for Review (Appeal) on the fifty-ninth day when the statute, the regulation, and prior case law interpreting this very statute (*Commonwealth v. Niemeyer Oldsmobile*, 12 Pa. Commonwealth Ct. 388, 316 A. 2d 152 (1974)), required filing (actual receipt) by the sixtieth day. The Petition was admittedly not received until the sixty-first day. Thus, the *Phinney* case is right on point.

A more recent federal case holding that filing takes place only when the clerk acquires custody is *United States v. Easement and Right-of-Way*, 386 F. 2d 769, 771 (6th 1967), *cert. denied*, 390 U.S. 947 (1968). Thus, federal law is in accord with the Pennsylvania case and statutory law in refuting Appellant's main contention in the State Court. Therefore, this case does not present a question not previously decided by the United States Supreme Court and repeatedly affirmed by Federal Circuit Courts.

The source of Appellant's contention regarding mailing day prevailing over actual receipt when filing as required, is Judge Kramer's dissents in three Commonwealth Court opinions cited in Appellant's Statement of Jurisdiction. First, it should be noted that in the instant case, in the decisions against Appellant by the Commonwealth Court and the Supreme Court of Pennsylvania, there were no dissents.

Secondly, in all three cases in which Judge Kramer dissented, Judge Kramer was the lone member of a seven judge court dissenting. Thirdly, Judge Kramer's dissent was contra to Pennsylvania Supreme Court case law in *Walsh v. Tucker*, 454 Pa. 175, 213 A. 2d 11 (1973) and

now in that Court's decision in this case. Fourthly, Judge Kramer's dissent runs directly contra to the provisions and the application of United States Supreme Court Rule 11.

Lastly, Judge Kramer in his original dissent in *Commonwealth v. Niemeyer*, 12 Pa. Commonwealth Ct. 388, 316 A. 2d 152 (1974), placed great reliance on the fact that the record did not disclose how long after the Sales Tax Board of Review's decision was mailed taxpayer received it. In this case, taxpayer (Appellant) admitted that the decision was received the day after it was mailed, thereby giving Appellant fifty-nine (59) days to file its Petition for Review. This fact nullifies the conjectured possibility of the *Niemeyer* case, supra, dissent wherein the taxpayer would receive the decision after the sixty-day period had run.

Thus, this case presents no substantial question not previously decided adversely to Appellant by Pennsylvania Courts following many federal courts' decisions and Rule 11 of this Court.

CONCLUSION

Appellant's Jurisdictional Statement does not raise any substantial federal question which was not already considered and disposed of by the Commonwealth and Supreme Courts of Pennsylvania in the instant case and by Federal Courts in prior cases. Furthermore, the major contention raised by Appellant in the State Courts is a question which has previously been decided by the United States Supreme Court adversely to Appellant's position, and such adverse decision has been repeatedly affirmed by Federal Circuit Courts. Wherefore, the Commonwealth (Appellee) respectfully moves the Court to dismiss the appeal or, in the alternative, to affirm the judgment entered in this case by the Supreme Court of Pennsylvania.

Respectfully submitted,

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